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FILED

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Appellant Pro Se

S. MURAKAWA, CLERK
THIRD CIRCUIT COURT
STATE OF HAWAII

IN THE CIRCUIT COURT OF THE THIRD CIRCUIT¹*
STATE OF HAWAII

E. KALANI FLORES,) CIVIL NO. 14-1-324 (Hilo)
) (Agency Appeal)
Appellant pro se,)
)
vs.) ORDER FOR REMAND
)
BOARD OF LAND AND NATURAL)
RESOURCES; DEPARTMENT OF LAND)
AND NATURAL RESOURCES; SUZANNE)
D. CASE, in her official capacity as) <u>Hearing on Oral Argument:</u>
Chairperson of the Board of Land and Natural) Date: March 11, 2016
Resources and the Director of the Department of) Time: 10:00 a.m.
Land and Natural Resources; STATE OF) Judge: Honorable Greg K. Nakamura
HAWAII; and UNIVERSITY OF HAWAII,)
)
Appellees.)
)

ORDER FOR REMAND

The matter of this agency appeal, notice of which was filed herein pursuant to Section 91-14, Hawai'i Revised Statutes, on August 25, 2014, having come on for oral argument before the Environmental Court of the Third Circuit (hereinafter "**Court**"), the Honorable Greg K. Nakamura presiding, on March 11, 2016 and E. KALANI FLORES, Appellant, having appeared *pro se* together with Deputy Attorney General Julie H. China, counsel for Appellees BOARD OF LAND AND LAND AND NATURAL RESOURCES, DEPARTMENT OF LAND AND NATURAL RESOURCES and SUZANNE D. CASE, in her official capacity as Chairperson of the Board of Land and Natural Resources and Director of the Department of Land and Natural Resources, STATE OF HAWAII and Arsima A. Muller and Tim Lui-Kwan appearing as counsel for Appellee UNIVERSITY OF HAWAII. No other appearances were made.

*Environmental Court

I hereby certify that this is a full, true and correct
copy of the original on file in this office.



Clerk, Third Circuit Court, State of Hawaii

The Court, having considered the record, memoranda, declarations, briefs and arguments presented or submitted herein, and good cause appearing therefor, hereby issues the following findings of fact, conclusions of law and order:

I. FINDINGS OF FACT

The Court makes the following findings of fact, however, to the extent that these findings of fact contain conclusions of law, they shall be considered as such.

1. This appeal relates to Appellee Board of Land and Natural Resources' (the "**Board**") consent to the Sublease and Non-Exclusive Easement Agreement Between TMT International Observatory LLC and the University of Hawaii (the "**Sublease**").

2. At a meeting held on June 27, 2014, the Board granted consent to the Sublease, but "stayed the effectiveness of the consent until administrative proceedings on any contested case requests" were concluded.

3. At a meeting held on July 25, 2014, the Board denied Appellant E. Kalani Flores' request for a contested case hearing.

4. The Sublease is part of the record. Paragraph 4 of the Sublease relates to the "Use of the Subleased Premises". It states in part:

The construction and operation of the Subleased Premises shall be conducted in strict compliance with the terms and conditions of Conservation District Use Permit HA-3568 approved by the Lessor [the "**Board**"] on April 12, 2013 (the "**TMT CDUP**"), including performance of all mitigation conditions set forth therein, and any amended or subsequent Conservation District Use.

5. The Consent to Sublease and Non-Exclusive Easement Agreement Between TMT International Observatory LLC and the University of Hawaii Under General Lease No. S-4191 (the "**Consent**") is part of the record. Paragraph 2 of the Consent states:

Sublessee [the TMT International Observatory LLC] shall comply with all the conditions of Conservation District Use Permit No. HA-3568, as approved by the Board of Land and Natural Resources' Findings of Fact, Conclusions of Law, and Decision and Order issued on April 12, 2013.

II. CONCLUSIONS OF LAW

The Court, based on the finding of fact above, makes the following conclusions of law. To the extent that these conclusions of law contain findings of fact, they should be considered as such.

1. The Court takes judicial notice of the Supreme Court of Hawai'i's opinion entered on December 2, 2015 in *Mauna Kea Anaina Hou, et al. v. Board of Land and Natural Resources, et al.*, 136 Hawai'i 376 (2015).

2. Consistent with *Mauna Kea Anaina Hou* opinion, the Board's Findings of Fact, Conclusions of Law and Decision and Order Granting Conservation District Use Permit HA-3568 (the "TMT CDUP") has been vacated.

3. Appellant has asked that this Court take judicial notice of the opinion in *Mauna Kea Anaina Hou* and vacate the Board's action in consenting to the Sublease. This is not appropriate because it requires consideration of an adjudicative fact, the vacating of the TMT CDUP, which the Board has not addressed.

4. However, Section 91-14(e) of the Hawai'i Revised Statutes ("HRS") provides the following:

[i]f, before the date set for hearing, application is made to the court for leave to present additional evidence material to the issue in the case, and it is shown to the satisfaction of the court that the additional evidence is material and that there were good reasons for failure to present it in the proceeding before the agency, the court may order that the additional evidence be taken before the agency upon such conditions as the court deems proper. The agency may modify its findings, decision, and order by reason of the additional evidence and shall file with the reviewing court, to become a part of the record, the additional evidence, together with any modifications or new findings or decision

5. Appellant's request that the Court take judicial notice of the *Mauna Kea Anaina Hou* opinion is the functional equivalent of a request that the fact that the TMT CDUP has been vacated be presented to the Board.

6. This fact is material because the Sublease and Consent are premised upon the existence of the TMT CDUP.

7. This fact could not have been presented to the Board when it considered the application for the consent to the Sublease because the fact did not exist at that time.

8. Therefore, the *Mauna Kea Anaina Hou* opinion and the Order for Remand, filed on February 22, 2016 in Civil No. 13-1-349, *Mauna Kea Anaina Hou, et al. v. Board of Land and Natural Resources, State of Hawai'i, et al.*, Third Circuit Court, State of Hawai'i (the "**Order of Remand**"), should be presented to the Board for appropriate action.

9. Therefore, an order of remand should be entered in this case to accomplish this purpose.

10. When reviewing the new evidence, the Board may consider the following questions:

- a) Since the TMT CDUP does not exist and its existence was a premise for the Board's grant of the consent to the Sublease, should the consent be withdrawn pending further proceedings in regard to the TMT CDUP application process?
- b) If the Board takes the position that the consent to the Sublease should remain in place because of the assumption that the Board will grant the TMT CDUP in the future, would this not run afoul of the "cart before the horse" due process concern established in the *Mauna Kea Anaina Hou* opinion?
- c) Since the existence of the TMT CDUP is such an integral part of the Board's consent to the Sublease, should parties who have standing in the TMT CDUP application process similarly have standing in regard to the consent to Sublease application process?
- d) In *Mauna Kea Anaina Hou*, Justices Pollack, Wilson and McKenna concurred in the following proposition: An agency is not merely a passive actor or neutral umpire. It has an affirmative duty to fulfill the State's constitutional obligations. How is the Board going to fulfill this affirmative duty in the absence of a contested case hearing and the grant of standing to an individual who seeks to have the State fulfill its constitutional obligations?

III. **ORDER**

Pursuant to the foregoing Findings of Fact and Conclusions of Law,

IT IS HEREBY ORDERED:


1. That the *Mauna Kea Anaina Hou* opinion and the Order for Remand be presented to the Board as additional evidence;
2. And that the Court further orders that this matter be remanded back to the Board for appropriate action in accordance with HRS § 91-14(e).

DATED: Hilo, Hawai'i APR - 5 2016.

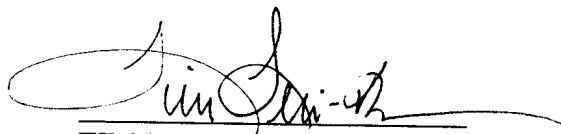
GREG K. NAKAMURA (Seal)

JUDGE OF THE ABOVE-ENTITLED COURT

APPROVED AS TO FORM:


JULIE H. CHINA
Deputy Attorney General

Attorneys for Appellees
BOARD OF LAND AND NATURAL
RESOURCES; DEPARTMENT OF LAND AND
NATURAL RESOURCES; SUZANNE D. CASE,
in her official capacity as Chairperson of the Board
of Land and Natural Resources and the Director of
the Department of Land and Natural Resources;
STATE OF HAWAI'I


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UNIVERSITY OF HAWAI'I

E. Kalani Flores vs. Board of Land and Natural Resources, et al., Civil No. 14-1-324; ORDER
FOR REMAND